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IMPLEMENTATION OF THE INTERNATIONAL COVENANT
ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: Day of General Discussion "The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15.1 (c) of the Covenant)" organized in cooperation with the World Intellectual Property Organization (WIPO)

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"Drafting History of the Article 15 (1) (c) of the International Covenant on Economic, Social and Cultural Rights"

Background Paper submitted by Maria Green, International Anti-Poverty Law Center, New York, NY, USA

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1. Painted in broad strokes, the current debate over intellectual property and human rights centres on two separate but deeply entwined issues: on the one hand, concern over access to patented scientific advances that impact on human health and food supply; and on the other, concern over misappropriation of traditional knowledge held by communities rather than invented by contemporary individuals.[1]

2. The principal legal sources for broaching these issues in human rights terms are the Universal Declaration of Human Rights (UDHR), article 27, and the International Covenant on Economic, Social and Cultural Rights (ICESCR), article 15. Both provisions set up, in nearly identical language, rights that seem to address both access to scientific progress and protection of the interests of individual creators. The texts of the two documents read as follows:

> UDHR:
>
> 1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
>
> 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
>
> ICESCR:
>
> 1. The States Parties to the present Covenant recognize the right of everyone:
>
> (a) To take part in cultural life;
>
> (b) To enjoy the benefits of scientific progress and its applications;
>
> (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
>
> 2. The steps to be taken by the States parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
>
> 3. The States parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
>
> 4. The States parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields.

Both documents appear to set up an unresolved tension between the provisions protecting access to advancement on the one hand and those protecting individual creators' rights on the other.

3. Although the ICESCR language appears to track the UDHR closely, however, article 15 (1) (c) was not an automatic inclusion in the ICESCR. Interestingly enough, the provision was explicitly excluded from that document at repeated drafting sessions of the United Nations Commission on Human Rights (CHR). It made its way into the Covenant only during a remarkably inconsequential debate of the Third Committee of the General Assembly in 1957, three years after the Commission had completed its work and five years after the cultural rights provision itself had last been debated. The history of the drafting discussions of the intellectual property rights aspects of the UDHR and, especially, the ICESCR, provide some intriguing perspectives on the current human rights debates.

The Universal Declaration of Human Rights[2]

4. According to Johannes Morsink's account of the drafting history of article 27 of the UDHR, there was not much disagreement at any point over the notion of the right of everyone, including those who did not participate in creating them, to enjoy the benefits of scientific advances. Cassin, the French delegate, stated that "even if all persons could not play an equal part in scientific progress, they should indisputably be able to participate in the benefits derived from it",[3] an approach which seems to reflect the general understanding of the Commission.[4]

5. In contrast, the discussion of authors' rights was more fraught, and more complex. According to Morsink, there were several issues at play. The French delegation, which proposed the original language on authors' rights, was concerned primarily with the "moral" rights mentioned in the text, which had to do with an author's control over alteration and other misuse of the creation, and which distinguished intellectual property rights from other property rights, covered elsewhere in the Declaration.[5] It was argued that moral rights ensured that "[t]he authors of all artistic, literary, scientific works and inventors shall retain, in addition to just remuneration for their labour, a moral right on their work and/or discovery which shall not disappear, even after such a work or discovery shall have become the common property of mankind".[6] Chang, the delegate from China, later stated that "the purpose of [a moral rights provision] was not merely to protect artists but to safeguard the interests of everyone. [...] [L]iterary, artistic and scientific works should be made accessible to the people directly in their original form. This could only be done if the moral rights of the creative artist were protected".[7] In other words, the provision could also be seen as protecting the integrity of the author's creation as much as the author him- or herself.

6. A further factor, which came into play during later drafting sessions, was the outcome of two international events that took place in 1948: the Berne International Copyright Convention and the drafting of the American Declaration on the Rights and Duties of Man. The American Declaration included a provision on authors' rights, and its slightly altered text was eventually offered by the French delegation as the basis for discussion in subsequent CHR drafting sessions.[8] The provision was rejected in the Commission but passed in the Third Committee, despite objections that intellectual property rights were adequately covered by the existing property rights provision or that they were not properly speaking a "basic human right".[9] Morsink tells us that some delegations in the Third Committee voted for the provision on the "moral rights" issue but that some others, especially a number of Latin American countries, backed it "more as a step towards the internationalization of copyright law",[10] or even, he

implies, as a nod towards the American Convention. At the final count, the highest proportion of proponents of the provision were from Latin America. The Communist countries (which were to play an important role in the decision on the same topic for the ICESCR) abstained from the vote.[11]

7. Morsink's chapter doesn't give any indication of a widespread discussion of the possible tension between paragraphs 1 and 2 of article 27; the issues involved in balancing the individual creator's rights with those of the community as a whole do not appear to have been substantively debated, or at least not in any detail. Not surprisingly, there is also no intimation of the issue of traditional knowledge or of indigenous peoples' particular concerns with regard to ownership of intellectual property.[12]

The International Covenant on Economic, Social and Cultural Rights[13]

A brief chronology

8. In early 1951, at its twelfth session, the United Nations Economic and Social Council (ECOSOC), acting at the bequest of the General Assembly, directed the Commission on Human Rights to include economic, social and cultural rights in the draft "covenant on human rights" that it was then preparing.[14]

9. The Commission began to discuss text on economic, social and cultural rights that same spring, in its seventh session (April-May 1951). The Commission's first substantive discussions of a treaty provision on cultural rights took place at this time, with extensive input from UNESCO. A draft article, eventually to be numbered article 30 of the single planned covenant on human rights, was adopted by the Commission during this session.

10. In July-September of 1951 ECOSOC reviewed the text prepared by the Commission. At the end of the session, its thirteenth, the Council invited the General Assembly to reconsider its decision to include both economic, social and cultural rights and civil and political rights in a single document. The General Assembly took account of this suggestion at its sixth session, in November 1951-February 1952, and decided to pursue two separate and simultaneous covenants, one to cover civil and political rights and the other to cover economic, social and cultural rights. It asked ECOSOC to ask the CHR to draft two separate documents, "the two covenants to contain, in order to emphasize the unity of the aim in view and to ensure respect for and observance of human rights, as many similar provisions as possible ...".[15]

11. The Commission on Human Rights accordingly returned to the drafting process during its eighth, ninth and tenth sessions, which ran between 1952 and 1954. The provision on cultural rights was discussed, and the Commission's proposed text finalized, in the eighth session, of April-June 1952.

12. The full text of both Covenants was conveyed to the General Assembly during the General Assembly's ninth session, in 1954. The General Assembly in turn passed the text to its Third Committee, to be gone through article by article at the following session.

13. The Third Committee began considering the two draft Covenants at the General Assembly's tenth session, in 1955. It reached the ICESCR's article on cultural rights at its twelfth session, in 1957, at which point the provision on authors' interests was successfully introduced into the document. The Third Committee's debate in 1957 was effectively the final discussion of the cultural rights provision, although the General Assembly revisited the ICESCR twice in following years (in 1962 to discuss articles 2-5 and in 1963 to introduce the explicit right to freedom from hunger), before formally adopting the full convention in 1966.

The substantive debates[16]

Commission on Human Rights, seventh session

14. At its seventh session the Commission was just beginning to tackle the inclusion of economic, social and cultural rights provisions into the single planned "draft covenant on human rights". When it arrived at cultural rights, in May 1951, it had the benefit of some advance work by UNESCO,[17] which eventually presented the Commission with two versions (one long and one short) of a draft provision.[18] At this early stage cultural rights were still being considered as part of a single article covering education and culture.[19]

15. The initial UNESCO draft contained the following provisions:

> Article (d)
>
> The Signatory States undertake to encourage the preservation, development and propagation of science and culture by every appropriate means:
>
> (a) By facilitating for all access to manifestations of national and international cultural life, such as books, publications and works of art, and also the enjoyment of the benefits resulting from scientific progress and its application;
>
> (b) By preserving and protecting the inheritance of books, works of art and other monuments and objects of historic, scientific and cultural interest;
>
> (c) By assuring liberty and security to scholars and artists in their work and seeing that they enjoy material conditions necessary for research and creation;
>
> (d) By guaranteeing the free cultural development of racial and linguistic minorities.
>
> Article (e)
>
> The Signatory States undertake to protect by all appropriate means the material and moral interest of every man, resulting from any literary, artistic or scientific work of which he is the author.[20]

16. The shorter alternative UNESCO proposal read:

> The Signatory States undertake to encourage by all appropriate means, the conservation, the development and the diffusion of science and culture.
>
> They recognize that it is one of their principal aims to ensure conditions which will permit every one:
>
> 1. To take part in cultural life;
>
> 2. To enjoy the benefits resulting from scientific progress and its applications;
>
> 3. To obtain protection for his moral and material interests resulting from any literary, artistic or scientific work of which he is the author.
>
> Each signatory State pledges itself to undertake progressively, with due regard to its organization and resources, and in accordance with the principle of non-discrimination enunciated in paragraph 1, article 1 of the present Covenant, the measures necessary to attain these objectives in the territories within its jurisdiction.[21]

17. The second UNESCO proposal became in effect the basis for the Commission's discussions in the seventh session.

18. There are two points of particular interest in the Commission's early discussion of the draft human rights treaty. The first is that although the text of ICESCR 15, in particular, ended up closely resembling that of the UDHR, this was an outcome that some delegates were from the beginning generally concerned to avoid, in part for fear of undercutting UDHR language *not* repeated. Eleanor Roosevelt, representing the United States, declared that:

> "It would be well to recall the difference between the Universal Declaration of Human Rights and the draft First International Covenant. The former consisted of a statement of standards which countries were asked to achieve. ...But ... a covenant was a very different kind of document, since it must be capable of legal enforcement. The task of drafting such an instrument was wholly unlike that of setting out hopes and aspirations relating to the rights and freedoms of peoples."[22]

Sorensen, the Danish delegate, argued that "[i]t would clearly be undesirable merely to transpose the relevant sections from the Universal Declaration to the draft Covenant, for to do so would weaken the authority of the former, and lead to unwarranted conclusions about the significance of those of its provisions which were not reiterated in the latter".[23]

19. The second point of interest is that the provisions on benefiting from scientific progress and on authors' rights, respectively, received very different treatment throughout the seventh session debates. From the beginning, there seems to have been little dissension over the notion of including a right to benefit from cultural and scientific advances.

20. Havet, speaking for UNESCO on 5 May, declared that "[t]he right of everyone to enjoy his share of the benefits of science was to a great extent the determining factor for the exercise by mankind as a whole of many other rights".[24] He later added that "[e]njoyment of the benefits of scientific progress implied the dissemination of basic scientific knowledge, especially knowledge best calculated to enlighten men's minds and combat prejudices, coordinated efforts on the part of States, in conjunction with the competent specialized agencies, to raise standards of living, and a wider dissemination of culture through the processes and apparatus created by science".[25] No one seems to have quarrelled with these characterizations, and the relevant text, i.e.

> They recognize that it is one of their principal aims to ensure conditions which will permit every one:
>
> 1. To take part in cultural life;
>
> 2. To enjoy the benefits resulting from scientific progress and its applications;

was adopted by 15 votes to none, with three delegations abstaining.[26]

21. When it came to the proposed language on authors' rights, however, the nay-sayers outnumbered the proponents by some margin. Among the proponents, Havet, the UNESCO representative, said that:

> "The UNESCO delegation considered that recognition of authors' rights should find a place in the Covenant, since it had already been included in the Universal Declaration, and represented a safeguard and an encouragement for those who were constantly enriching the cultural heritage of mankind. Only by such means could international cultural exchanges be fully developed."[27]

He had earlier mentioned that:

> "With regard to the protection of the moral and material interests of authors and artists, UNESCO was proceeding with the task of harmonizing national and international legislation and practice in that field. It was hoped that a convention would be submitted to Governments, for signature in 1952, relative to the interests of artists and writers, including scientific writers, but excluding the question of scientific discovery in the strict sense of the term, and of patents, in connection with which special studies were being made by the UNESCO Secretariat."[28]

22. The French delegation, which was strongly pushing the authors' rights language, argued that "[t]he relevant passages ... merely stressed that the moral and material interests of persons taking part in cultural and scientific life should be safeguarded. It would be unfortunate to omit from the Covenant principles already stated in the Universal Declaration regarding protection of the moral and material rights of authors, artists and scientists".[29]

23. Among the opponents, Roosevelt, speaking for the United States, stated that:

> "[i]n her delegation's opinion the subject of copyright should not be dealt with in the Covenant, because it was already under study by UNESCO which ... was engaged on the collation of copyright laws with the object of building up a corpus of doctrine and in due course drafting a convention. Until all the complexities of that subject had been exhaustively studied, it would be impossible to lay down a general principle concerning it for inclusion in the Covenant."[30]

24. Santa Cruz, speaking for the Chilean delegation, said that "while the protection ... was useful in certain circumstances and at certain periods in the life of nations, the question was not one involving a fundamental human right. In his submission, the rights of all individuals enunciated in paragraph 2 of article 3 [presumably this refers to the benefits of scientific progress phrase] were of far greater and wider import".[31]

25. The passage was rejected by 7 votes to 7, with 4 delegations abstaining.[32] The full article on cultural rights was then adopted by 14 to none, with 4 delegations, including the French, abstaining.[33]

Commission on Human Rights, eighth session

26. One year later, in May of 1952, the Commission returned to the cultural rights provision, this time in the context of a separate Covenant on Economic, Social and Cultural Rights. Once again, the question of protection of authors' rights was debated, and this time more heatedly than before.

27. The French delegation, resubmitting the original provision, argued that:

> "The draft covenant included provisions for the protection of the property and emoluments of professional workers and should therefore be completed by a provision for the protection of the moral and material interests resulting from scientific, literary or artistic production .... It was not a matter only of material rights; the scientist and artist had a moral right to the protection of his work, for example against plagiarism, theft, mutilation and unwarranted use."[34]

28. The American delegation, still represented by Eleanor Roosevelt, reiterated its position that the issue was too complex to be dealt with in the Covenant, and should be addressed elsewhere.[35] The United Kingdom adopted a similar position,[36] as did Yugoslavia.[37] UNESCO, while agreeing that the subject was complex, argued briefly for including the provision in the Covenant, as "it was nevertheless desirable to state the need for such protection in that instrument".[38]

29. Other delegations, however, raised at this session some of the questions that appear to have gone largely undiscussed during the previous debate. Valenzuela, the Chilean delegate, stated that:

> "He fully sympathized with the praiseworthy intentions of the French delegation and agreed that intellectual production should be protected; but there was also need to protect the under-developed countries, which had greatly suffered in the past from their inability to compete in scientific research and to take out their own patents. As a result, they were in thrall to the technical knowledge held exclusively by a few monopolies. As the French amendment would perpetuate that situation, he would have to vote against it. In general, the subject was so complex that it would have to be dealt with in a separate convention than in a single article of the covenant on human rights".[39]

30. Azmi bey, the Egyptian delegate, agreed with this position,[40] and Whitiam, the Australian delegate, took a similar approach, saying that "it was inadvisable to provide for the protection of the author without also considering the rights of the community".[41]

31. The substantive responses to these concerns came from the United Kingdom (which however was rejecting the provision on other grounds), and the French. Juvigny, the French representative, said simply that "[h]e did not agree with the Chilean representative that monopoly in the field of patents represented such a grave danger; moreover, the absence of protection was not a remedy for the unfavourable situation in under-developed countries".[42] Hoare, representing the United Kingdom, responded to the underlying issue more fully:

> "The Chilean representative had raised an interesting point: the conflict between the conception that the rights of the creative worker must be protected and the principle that there should be no obstruction to the general utilization of the results of his work in the interests of humanity. In the light of these remarks, sub-paragraph (b) of the original article 30 deserved further examination. He had always understood it to mean that the benefits of scientific progress were to be made available to all within the limits and by use of the machinery which already existed. If the Chilean representative believed that the clause was intended to do away with all the intermediaries between the inventor and the general application of his invention, he was proposing to reform the world by one brief article. Such a conception went far beyond the scope of the covenant, and the United Kingdom delegation could not subscribe to it".[43]

There is no record of this line of discussion being pursued further, however, and the final vote was probably based on several different lines of reasoning. At any event, the passage on authors' rights was once again rejected, this time by a vote of seven to six, with four delegations abstaining.[44]

32. The draft article that was finalized in that session and eventually submitted to the General Assembly read as follows:

ARTICLE 16

Rights relating to culture and science

1. The States Parties to the Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications.

2. The steps to be taken by the States Parties to this Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the Covenant undertake to respect the freedom indispensable for scientific research and creative activity.[45]

General Assembly Third Committee, twelfth session

33. After the Commission finalized its draft text of the two Covenants the drafts were sent, with annotations, to the General Assembly, and from there to the Third Committee for review. The Third Committee reached the draft article on cultural rights at its twelfth session, in late October and early November 1957.

34. Once again, there was no dissent concerning the provision on enjoying the benefits of scientific progress. The only reference to that passage was by D'Souza, the Indian representative, who mentioned that "undoubtedly scientific discoveries should benefit not only all individuals, but also nations, regardless of their degree of development".[46] His characterization was not disputed.

35. With regard to the authors' rights provision, however, the situation was once again more complicated and more fraught. The French delegation, again represented by Juvigny, urged that it be included in the final document but refrained from proposing it itself.[47] The formal proposal was made by Uruguay, represented by Tejera, who "considered that a reference to authors' copyright was imperative. For lack of international protection, literary and scientific works, for example, were frequently pirated by foreign countries which paid no royalties to the authors".[48] Uruguay later added that "the right of the author and the right of the public were not opposed to but complemented each other. Respect for the right of the author would assure the public of the authenticity of the works presented to it".[49]

36. The responses to the proposal varied widely. A number of states seemed to believe that because the provision had been in the UDHR, its omission in the draft text of the ICESCR must have been an oversight. Hoare, again representing the United Kingdom, said that:

> "The amendment submitted by Uruguay undoubtedly made good an omission. He did not recall exactly why the Commission on Human Rights had rejected a similar recommendation, nor what stand his delegation had taken. But it certainly seemed to him now that it was essential to include a provision corresponding to that in article 27, paragraph 2, of the Universal Declaration of Human Rights in the Covenant. He congratulated the representative of Uruguay on its action."[50]

37. UNESCO advised including the provision.[51] Chile, which had opposed the provision in the Commission on Human Rights, now supported it: "As one of the signatories of the Universal Copyright Convention, which was fully in accordance with its own legislation, Chile had no difficulty in supporting that amendment."[52]

38. Other statements of support, based on the theory of encouraging culture, came from Sweden ("the protection of those rights would be an encouragement to science and creative activity"[53]) and Israel ("the provisions of the draft covenant should not be in any way weaker than those of the Universal Declaration of Human Rights. It would be impossible to give effective encouragement to the development of culture unless the rights of authors and scientists were protected"[54]). Delegations like the Dominican Republic based their support primarily on the protection of the author: "[the provision] should have the support of all delegations, as its essential purpose was to ensure that men and women should enjoy the fruits of their intellectual and artistic efforts and that their work should not be pirated or exploited by unprincipled editors and publishers".[55]

39. The first objection came from Nur, the Indonesian delegate, who cited the arguments in the Commission on Human Rights, saying that "the matter could not be treated adequately in a short provision and that authors' rights had to be considered in the light of the claims of the public in all countries".[56] Morozov, the USSR delegate, also recalled the arguments on complexity that had come up in the Commission on Human Rights. He added that:

> "Furthermore, by inserting a clause of that kind the balance of the Covenant would be upset. An examination of the nature of the rights set forth in that instrument would reveal that they were rights which concerned all mankind, but the clause that it was proposed to add to article 16 concerned a particular group. The fact that a principle was enunciated in the Universal Declaration of Human Rights did not mean that it should be repeated automatically in the Covenant."[57]

Later, the USSR delegate drew a distinction between a provision mandating national-level protection of authors' rights, which he would favour "on condition that the words 'in accordance with the laws of the States concerned' or some similar formula was added," and one mandating international obligations, which he would not. He stated that "if it was a question of relations between States in regard to copyright and patents, he considered that such relations should be governed by special agreements outside the scope of the covenants on human rights".[58] He also questioned whether the Covenant clause would "[exceed] the scope of existing conventions".[59]

40. Other objections came from Saudi Arabia (which pointed out that scientific research, unlike literary and musical works, "was usually the result of teamwork" and therefore raised special questions)[60] and, particularly, Czechoslovakia, which argued that:

> "States would find it difficult to adhere both to the existing international instruments concerning copyright [including the Universal Copyright Convention of 1952] and to article 16 [as the article was then numbered] as amended ... That Convention and other international agreements on the subject took into account the special conditions in the different countries. If all such agreements were to be superceded by the [amendment] proposal, the position would be far from clear ... She was puzzled by the sponsors' motives in submitting their amendment. If they found the existing agreements on the subject unsatisfactory, it was difficult to see why they had not insisted on a full debate on what was a very delicate and complicated question, instead of trying to push through a hastily drafted and unsatisfactory text, which might well be misinterpreted."[61]

Uruguay replied that:

> "The effect of the UNESCO and other international conventions would be gradually to bring the legislation of the contracting countries into line with a minimum acceptable level, but most countries, including his own, were already far ahead of those conventions. Objections to the amendment seemed to come only from countries which did not feel that they could assume the obligation of progressively carrying authors' rights into effect. Finally, there seemed to be every reason to maintain intact the text which appeared in the Universal Declaration of Human Rights."[62]

The Uruguayan delegate had earlier declared that "[t]o state that authors' rights should be protected in accordance with the laws of each country [as the USSR had suggested], would be to introduce a dangerous stipulation, since it was not impossible that certain States might arrogate to themselves the profits accruing from artistic property".[63]

41. In the end, the provision on authors' rights was voted in by a margin of 39 to 9, with 24 delegations abstaining.[64]

42. The final vote on the provision probably owes a great deal to the context of the debate. The overall discussion of the cultural rights had been dominated by the continuation of an earlier argument about the desire of the Eastern Bloc to add the phrase "in the interest of the maintenance of peace and cooperation among nations" to the second paragraph.[65] This debate had started in the Commission on Human Rights, but in the Third Committee its political overtones were more overt and pronounced, and the subtext to the entire discussion was the issue of government control over science and art, and scientists and artists.[66]

43. The provision on authors' rights, judging from the exchanges between the USSR, Czechoslovakia, and Uruguay, became associated with protection for authors' freedom from state intervention. Any substantive issues to be worked out on the relation between the "benefits" clause and the "authors'" clause never had a real chance for discussion. The final vote was straight down cold war faultlines, with the opposed roster holding Romania, Ukrainian Soviet Socialist Republic, USSR, Albania, Bulgaria, Byelorussian Soviet

Socialist Republic, Czechoslovakia, Hungary, and Iraq, and the pro roster holding Mexico, Morocco, Netherlands, New Zealand, Norway, Pakistan, Panama, Peru, Portugal, Spain, Sweden, United Kingdom, Uruguay, Venezuela, Argentina, Australia, Austria, Belgium, Brazil, Canada, Ceylon, Chile, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, Finland, France, Ghana, Guatemala, Haiti, Honduras, Ireland, Israel, and Italy.[67] Indonesia, which had been one of the early delegations to speak out against the provision, was among the abstainers.[68]

Conclusions

44. In the context of modern human rights issues, articles 15 (1) (b) and 15 (1) (c) of the ICESCR raise very real questions of interpretation and implementation. We face a world with issues that the drafters of the ICESCR could never have envisaged, from an AIDS epidemic reigning in one part of the world while the drugs that could help are largely owned in another, to scientifically engineered non-reproducing crops, to scientists "bio-prospecting" for traditional knowledge whose ownership does not fit into existing patent definitions.[69] Then, too, with the recent tying of intellectual property to trade law, international intellectual property rights have undergone a sea-change, becoming universal, compulsory, and enforceable in ways that were never dreamt of in the middle of the last century.[70]

45. By raising both the right to "benefit from the advances of science" and the right to "material and moral interests resulting" from one's work to the level of human rights, the drafters set up a tension that must be resolved if article 15 is to be made effective. It is fascinating to note, however, that the distinguished men and women who gave us the ICESCR did not seem to deeply consider the difficult balance between public needs and private rights when it comes to intellectual property. When the question was raised, they tended to dismiss it almost out of hand. Primarily, they seem to have assumed that the goals of 15 (1) (b) were obvious and beyond discussion, the benefits of science being a fundamental human right that belongs to everyone. They seem to have seen article 15 (1) (c), however, as a smaller thing, one that served to protect several different potential interests, according to the views of the drafter: some delegates were concerned to entrench in international law the author's individual rights to control the "moral" aspects of his or her work; some were concerned to confirm that "moral" right as a means of protecting the public interest in the integrity of a published creation; some were probably guided by a simple desire to reinforce the existing international copyrights laws. In all cases, however, it is noticeable that the drafters appeared to be thinking almost exclusively of authors as individuals. Perhaps it was obvious from the fact that this was a "human rights" treaty, but the drafters do not seem to have been thinking in terms of the corporation-held patent, or the situation where the creator is simply an employee of the entity that holds the patent or the copyright.

46. As a human rights analysis is developed for intellectual property, it will have to address a set of government decisions in the domestic and international sphere that have dramatic impact on the rights to food and health. Taking a human rights approach to intellectual property means examining whether research development policies, price regulations, marketing rules, and a myriad of other policy decisions, including above all international trade or investment agreements, effectively protect the rights of all to the "benefits of scientific progress". A human rights analysis of the TRIPS Agreement and its progeny, in particular, requires us to face

head-on the boundaries of what ICESCR 15 (1) (c) can and should protect. The relationships among trade, investment, intellectual copyright law, the human right to benefit from scientific progress, and the rights to food and health, among others, all need to be carefully and slowly untangled. An interesting starting point might be the thought that the rights of authors were included in the end as an explicit part of the human rights regime, and the encouragement of creativity and the protection for the public of the integrity of finished products were recognized as important public goals, but 15 (1) (c) does not seem to have been written as an intentional limit on the rights of all to benefit.

Notes

[1] See, inter alia, resolution 2000/7 of the United Nations Commission on Human Rights (2000); collected articles in *Intellectual Property and Human Rights* (Proceedings of a Panel Discussion Held by the World Intellectual Property Organization [WIPO] in Collaboration with the Office of the UN High Commissioner for Human Rights, 9 November,1998); "Building Human Rights Safeguards into the TRIPS Agreement" (Box, *Human Development Report 2000*, p. 84), and Rosemary J. Coombe, "Intellectual Property, Human Rights and Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity" 6 Ind. J. Global Leg. Stud. 59, Fall, 1998. See also studies and reports by WIPO on intellectual property and traditional knowledge (available online at http://www.wipo.int/traditionalknowledge/documents/index.html).

[2] In the following brief discussion of the drafting history of the UDHR provision I have relied primarily on chapter 6.3 of Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*. University of Pennsylvania Press, 1999. Apparently a detailed history of this provision, prepared by Richard Pierre Claude at the request of the American Association for the Advancement of Science, also exists. See citation to Richard Pierre Claude, "Scientists' Rights and the Right to the Benefits of Scientific History" in footnote 24 of Audrey Chapman, "A Human Rights Perspective on Intellectual Property" in *Intellectual Property and Human Rights* (Proceedings of a Panel Discussion Held by the World Intellectual Property Organization in Collaboration with the Office of the United Nations High Commissioner for Human Rights, 9 November 1998), pp. 126-168.

[3] Morsink p. 219, citing A/C.3/261, p. 619.

[4] Note however that Verdoodt, in an earlier account than Morsink's, mentions that the USSR delegate expressed concern at one point that the passage might imply an obligation to reveal scientific secrets. The United States delegate assured him that it did not: "Madame Roosevelt (E.U.) fait noter dans le rapport qu'il n'en est pas question". A. Verdoodt, *Naissance et Signification de la Declaration Universelle des Droits de l'Homme*, Louvain, 1964, p. 254, citing E/CN.4/AC.2/SR.9, pp. 2-4.

[5] Morsink p. 219. According to Peter Drahus, infra note 70, "The term 'copyright' ... refers to those common law systems that characterize the exclusive rights of authors in essentially economic terms (the rights to reproduce the work, to publish it and to adapt it are examples). Within civil law systems, the rights of authors are seen, at base, as being about the protection of

the authorial personality (the right to be acknowledged as the author of the work and the right to control alterations to the work are core rights). These systems are not referred to as copyright but rather as authors' rights". pp. 13-14.

[6] Morsink, p. 220, citing E/CN.4/W.2/Rev.2.

[7] Morsink, p. 222, citing A/C.3/261, p. 628.

[8] Morsink, p. 220.

[9] Morsink, p. 221.

[10] Morsink, p. 221.

[11] Morsink, p. 222.

[12] However, Morsink includes, in a later chapter, a fascinating discussion of why group rights were not, in the end, explicitly mentioned in the UDHR. See Morsink, pp. 269 ff.

[13] For the discussion of the drafting history of the ICESCR I have consulted numerous United Nations documents, which are detailed in the footnotes below. I am indebted to Yvonne Donders of Maastricht University for providing me with an invaluable list *of Travaux Preparatoires* documents.

[14] "Draft International Covenants on Human Rights: Annotation". Report of the Secretary-General to the Tenth Session of the General Assembly, 1 July 1955. UN document number A/2929, p. 11. The original General Assembly directive was in resolution 421 E (V).

[15] Ibid., p. 14. The General Assembly resolution was number 543 (VI).

[16] Several of the delegates mentioned below had been key figures in the drafting of the UDHR. Morsink describes an "inner core" of UDHR drafters that has included, inter alia, R. Cassin of France, P.-C. Chang of China, C.H. Malik of Lebanon, E. Roosevelt of the United States and H. Santa Cruz of Chile. See Morsink, pp. 28-31.

[17] According to the UNESCO representative at the 1957 Third Committee debate, UNESCO had convened a meeting of experts following its 1951 General Conference to discuss definitional issues concerning cultural rights. A reference to a report of the meeting cites document number 7C/PRG/10. The Third Committee comment can be found in A/C.3/SR.796, p. 4.

[18] The UNESCO draft suggestions were submitted in document number E/CN.4/541/Rev.1.

[19] A collection of proposed text available to the Commission at this time can be found in E/CN.4/AC.14/2.

[20] E/CN.4/AC.14/2, p. 3.

[21] E/CN.4/AC.14/2, p. 4.

[22] E/CN.4/SR.206, p. 12. Note that quotes such as this, taken from the summary record of the proceedings, reflect the record's notes on what was said and are not a direct transcript of the speaker's words.

[23] E/CN.4/SR.207, p. 11.

[24] E/CN.4/SR.228, p. 11.

[25] E/CN.4/SR.228, p. 12.

[26] E/CN.4/SR.230, p. 7.

[27] E/CN.4/SR.228, p. 13.

[28] E/CN.4/SR.228, p. 12. It is interesting that UNESCO was distinguishing between "the interests of artists and writers, including scientific writers" and "the question of scientific discovery in the strict sense of the term, and of patents".

[29] E/CN.4/SR.229, pp. 12-13.

[30] E/CN.4/SR.229, p. 10.

[31] E/CN.4/SR.230, p. 8.

[32] E/CN.4/SR.230, p. 7.

[33] E/CN.4/SR.230, p. 8.

[34] E/CN.4/SR.292, pp. 8-9.

[35] E/CN.4/SR.292, pp. 8-9-.

[36] See E/CN.4/SR.292, p. 9 and E/CN.4/SR.293, p. 9.

[37] E/CN.4/SR.293, p. 5.

[38] E/CN.4/SR.292, p. 13.

[39] E/CN.4/SR.292, p. 7.

[40] E/CN.4/SR.292, p. 8.

[41] E/CN.4/SR.292, p. 14.

[42] E/CN.4/SR.292, p. 14.

[43] E/CN.4/SR.292, p. 10.

[44] E/CN.4/SR.294, p. 4.

[45] Draft International Covenants on Human Rights: Annotation. Report of the Secretary-General to the tenth session of the General Assembly, 1 July 1955, UN Document number A/2929, p. 329-.

[46] A/C.3/SR.796, p. 7.

[47] See A/C.3/SR.796, p. 11.

[48] A/C.3/SR. 797, p. 6.

[49] A/C.3/SR.798, p. 9.

[50] A/C.3/SR.798, p. 5. See also the statements of Belgium (p. 4), Italy (p. 4), Guatemala (p. 8), Costa Rica (p. 12), Ecuador (A/C.3/SR.799, p. 4), and the Philippines (SR.799, p. 5).

[51] A/C.3/SR.796, p. 3.

[52] A/C.3/SR.799, p. 5.

[53] A/C.3/SR.798, p. 7.

[54] A/C.3/SR.798, pp. 9-10.

[55] A/C.3/SR.799, p. 3.

[56] A/C.3/SR.798, p. 2.

[57] A/C.3/SR.798, p. 6.

[58] A./C.3/SR.798, p. 11.

[59] A./C.3/SR.798, p. 11.

[60] A/C.3/SR.798, p. 13 and SR.799, p. 8.

[61] A/C.3/SR.799, p. 6.

[62] A/C.3/SR.799, pp. 7-8.

[63] A/C.3/SR.798, p. 12.

[64] A/C.3/SR.799, pp. 11-12.

[65] See A/C.3/SR.795, p. 4.

[66] See the statement of the United Kingdom delegate, A/C.3/SR.795, p. 5: "... a statement of the aims of [scientific] research might provide a pretext for State control over scientific research and creative activity. He was firmly opposed to any control in the matters of science and culture ...".

[67] A/C.3/SR.799, pp. 11-12.

[68] A/C.3/SR.799, pp. 11-12.

[69] For a discussion of traditional knowledge and patent definitions in the TRIPS Agreement, see John Mugabe, "Intellectual Property Protection and Traditional Knowledge: An Exploration in International Policy Discourse", in *Intellectual Property and Human Rights* (Proceedings of a Panel Discussion Held by the World Intellectual Property Organization in Collaboration with the Office of the UN High Commissioner for Human Rights, 9 November 1998) pp. 96-125, at p.-109.

[70] See Peter Drahos, "The Universality of Intellectual Property Rights: Origins and Development," in *Intellectual Property and Human Rights* (Proceedings of a Panel Discussion Held by the World Intellectual Property Organization in Collaboration with the Office of the UN High Commissioner for Human Rights, 9 November 1998) pp. 12-41, at pp. 19-23.

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